

Hartvig v. Merz, BAP No. 94-2097-AsVH  
Adv. No. 93-3578

In re Floating Point Systems, Case No. 391-36490-P7

7/27/95                      BAP                      unpublished

Affirming Judge Perris

The trustee sought to recover certain payments to Merz under 11 U.S.C. § 547. Merz raised an ordinary course of business defense under § 547(c)(2). The bankruptcy court struck the portion of Merz' affidavit stating that the debts were incurred and the payments were made in the ordinary course of the debtor's business. The court then found no evidence to support the § 547(c)(2) defense and entered judgment for the trustee.

On appeal, the BAP affirmed the bankruptcy court's decision to strike the portion of the affidavit, determining that the statements were legal conclusions without adequate foundation and not based on personal knowledge under Fed. R. Evid. 602. There being no admissible evidence as to whether the debts were incurred and the payments were made in the ordinary course of business, the BAP determined that Merz failed to satisfy his burden of establishing the elements of section 547(c)(2).

NOT FOR PUBLICATION

FILED

JUL 27 1995

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

CLERK, U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON

JUL 27 1995

LODGED REC'D  
PAID DOCKETED

In re )  
 )  
FLOATING POINT SYSTEMS, INC., )  
dba FPS Computing, an Oregon )  
corporation, )  
 )  
Debtor(s). )  
 )  
CHRIS MERZ, dba Wholesale )  
Reprographics, )  
 )  
Appellant, )  
 )  
v. )  
 )  
DONALD H. HARTVIG, Trustee, )  
 )  
Appellee. )

BAP No. OR-94-2097-AsVH  
BK. No. 391-35490-elp7  
Adv. No. 93-3578

MEMORANDUM

Argued and Submitted on  
June 20, 1995 at Portland, Oregon

Filed - JUL 27 1995

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: ASHLAND, VOLINN, and HAGAN, Bankruptcy Judges.

1 Chris Merz appeals from a judgment in favor of the Chapter 7.  
2 trustee. The bankruptcy court granted the trustee's summary  
3 judgment motion after it granted the trustee's motion to strike a  
4 portion of an affidavit of Mr. Merz for lack of proper foundation.  
5 We affirm.

6  
7 **STATEMENT OF THE FACTS**

8 In July 1991 Floating Point Systems, Inc. made four transfers  
9 to Wholesale Reprographics, a business owed by Appellant Chris  
10 Merz. On October 7, 1991 Floating Point filed a voluntary petition  
11 under Chapter 11 of the Bankruptcy Code. The case was later  
12 converted to one under Chapter 7 and Donald H. Hartvig was  
13 appointed the Chapter 7 trustee.

14 The trustee filed a complaint against Wholesale Reprographics  
15 to recover the preferential transfers; the complaint was later  
16 amended to include Chris Merz as a defendant. The defendant  
17 answered and asserted the ordinary course of business as an  
18 affirmative defense pursuant to § 547(c)(2) of the Bankruptcy Code.  
19 The trustee moved for summary judgment on the complaint.

20 The bankruptcy court granted the trustee's motion for summary  
21 judgment with respect to the § 547(b) preference issues. However,  
22 the court did not grant the trustee summary judgment on the  
23 § 547(c)(2) ordinary course of business defense. The trustee made  
24 a second motion for summary judgment on the affirmative defense  
25 issues arising under § 547(c)(2).

26 Mr. Merz opposed the summary judgment motion and submitted his

1 affidavit in support of the opposition. The trustee moved to  
2 strike certain portions of the affidavit. The court conducted a  
3 hearing on the motion, granting it in part. The language of the  
4 affidavit that was stricken stated that the debts were incurred "in  
5 the ordinary course of business or financial affairs of the debtor"  
6 and that the transfers were made "in the ordinary course of  
7 business or financial affairs of the debtor" and "according to  
8 ordinary business terms." See, Appellant's E.R. 76 and 83.

9 The court further granted the trustee's second motion for  
10 partial summary judgment on the basis that there was no evidence to  
11 support the ordinary course of business defense once the relevant  
12 portions of Mr. Merz' affidavit were stricken. Judgment was  
13 entered against Mr. Merz for \$22,280 plus interest, sanctions, and  
14 costs. He timely appealed the judgment.

#### 15 16 ISSUE ON APPEAL

17 Whether the bankruptcy court erred in granting the motion to  
18 strike a portion of the affidavit of Chris Merz for lack of proper  
19 foundation and whether the court erred in granting the trustee's  
20 second motion for partial summary judgment.

#### 21 22 STANDARD OF REVIEW

23 The grant of a motion to strike is an evidentiary ruling  
24 reviewed for an abuse of discretion. United States v. McClintock,  
25 748 F.2d 1278, 1291 (9th Cir. 1984), cert. denied, McClintock v.  
26 United States, 474 U.S. 822 (1985). Such a ruling will not be

1 reversed absent some prejudice. Kisor v. Johns-Manville Corp., 783  
2 F.2d 1337, 1340 (9th Cir. 1986), citing, Coursen v. A.H. Robins  
3 Co., Inc., 764 F.2d 1329, 1333 (9th Cir. 1985).

4 The grant of a summary judgment motion is reviewed de novo.  
5 In re Kroy (Europe) Ltd., 27 F.3d 367, 368 (9th Cir. 1994); In re  
6 Ramsey, 176 B.R. 183, 186 (9th Cir. BAP 1994). Viewing the  
7 evidence in a light most favorable to the nonmoving party, we must  
8 determine whether there are any genuine issues of material fact and  
9 whether the trial court applied the correct legal standard. In re  
10 Kemp Pacific Fisheries, Inc., 16 F.3d 313, 315 (9th Cir. 1994).

#### 11 12 DISCUSSION

13 Federal Rule of Evidence 602 requires that a witness have  
14 personal knowledge of the facts which are asserted to be offered  
15 into evidence. The rule states that it is subject to the  
16 provisions of FRE 703, relating to opinion testimony by expert  
17 witnesses. Although an expert can testify to opinion based upon  
18 facts of which he does not have personal knowledge, a lay person's  
19 opinion testimony is not admissible unless a foundation for  
20 personal knowledge is established.

21 The trustee's motion to strike sought to strike the following  
22 language in Mr. Merz' affidavit:

23 / / /

24 / / /

25 / / /

26 / / /

1 The payments referenced in Plaintiff's Complaint ...  
2 were payments of a debt incurred by debtor FPS in  
3 the ordinary course of business or financial affairs  
4 of FPS and Wholesale Reprographics, and they were  
5 made in the ordinary cours(sic) of business or  
financial affairs of debtor FPS Computing and  
Wholesale Reprographics, and they were made  
according to ordinary business terms.

6 Appellant's E.R. 76:13-22.

7 The above statements are legal conclusions that lack adequate  
8 foundation and are, therefore, inadmissible. Select Creations,  
9 Inc. v. Paliafito America, Inc., 852 F. Supp. 740, 744 n.5 (E.D.  
10 Wis. 1994). The statements further constitute improper opinion  
11 testimony. Mr. Merz is not testifying as an expert so must,  
12 therefore, prove that he has personal knowledge of the facts or  
13 opinion he is offering into evidence. Mr. Merz contends in his  
14 affidavit that he acquired personal knowledge concerning whether  
15 the payments were made or incurred in the ordinary course of  
16 business or in accordance with ordinary business terms through  
17 conversations with "Joel Brodie of the San Diego office of FPS, and  
18 Bob Dries, Purchasing Manager for FPS, located in their Beaverton  
19 area office." Appellant's E.R. 76:7-9. The conversations with  
20 these people do not qualify as Mr. Merz' personal knowledge.  
21 Furthermore, to the extent that Mr. Merz is testifying to the  
22 statements made by these men, and offering these statements for the  
23 truth of the matter asserted, the testimony would be inadmissible  
24 as hearsay.

25 Therefore, the bankruptcy court did not abuse its discretion  
26 in granting the trustee's motion to strike the above testimony of

1 Mr. Merz. Based on the foregoing, the bankruptcy court was further  
2 correct in granting the trustee's second motion for partial summary  
3 judgment.

4 In order to prove his ordinary course of business defense, Mr.  
5 Merz held the burden to establish each of the elements of  
6 § 547(c)(2). In re Seawinds, Ltd., 91 B.R. 88, 91 (9th Cir. BAP  
7 1989), adopted, 888 F.2d 640 (9th Cir. 1989). To defeat the  
8 trustee's motion for summary judgment, Mr. Merz would either have  
9 had to show that there was a material question of fact or that he  
10 should prevail on the relevant questions of law. Here, the facts  
11 were not in dispute and once the trial court struck the  
12 inadmissible portion of Mr. Merz affidavit, there was no evidence  
13 relating to the ordinary course of business defense. Without such  
14 evidence, there was no basis for Mr. Merz' affirmative defense  
15 pursuant to § 547(c)(2).

16 Mr. Merz argued at oral argument that the trustee submitted no  
17 affidavit to contradict the evidence presented by Mr. Merz.  
18 However, there was no need for the trustee to submit such an  
19 affidavit. Mr. Merz held the burden to prove his affirmative  
20 defense and did not meet that burden.

21 It should be noted that this panel was not provided a copy of  
22 the transcript of the July 19, 1994 hearing which Judge Perris  
23 stated contained the court's oral findings. However, the panel  
24 independently finds a basis to affirm the court's grant of the  
25 summary judgment motion.

26 The Chapter 7 trustee requested attorney fees for this appeal

1 under Federal Rule of Appellate Procedure 38. We decline to deem  
2 this appeal frivolous and, therefore, do not award the trustee his  
3 attorney fees.

4  
5 CONCLUSION

6 Based upon the forgoing, the judgment of the bankruptcy court  
7 is affirmed.